No. 2365

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

OLAF LIE, Master of the Norwegian Steamship "Selja", on behalf of himself and the owners, officers and crew of said steamship,

Appellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY (a corporation), Claimant of the American Steamship "Beaver", her engines, etc.,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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Filed this.....day of January, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellant herein respectfully petitions for a rehearing of this case upon the following grounds:

1. Unfortunately and unaccountably the court has approached, considered and decided the question of the "Selja's" contributory liability for this collision upon a hypothesis of fact contrary to any possible theory

on which it might be said the case was tried, and unsupported by any conceivable construction or interpretation of the record. Namely, it bases its conclusion of contributory fault upon a finding that the "Selja's" engines were not stopped until *one minute* before the collision, when in fact they were stopped *six minutes* before the collision.

2. In the court's statement of the burden of proof rule of the Pennsylvania case, there is a clear misconstruction in this, that, as stated by the court, the rule places upon a vessel, which has committed a positive breach of a statutory duty, the burden of showing that such breach could not have contributed to the collision, *and this, seemingly irrespective of the time when the breach of the rule has occurred.*

3. In considering the *test* of contribution to a fog collision, the court applies one in this case which has expressly been declared by the Supreme Court of the United States as *"manifestly * * * not the proper test"*.

4. In considering the respective faults of the "Beaver" and "Selja" the court has failed to apply in the "Selja's" behalf the major and minor fault doctrine applicable to this collision.

Argument.

FIRST GROUND:

Even the casual reader of the decision rendered in this case would reach the conclusion that the "Selja"

is held at fault, because (to use the language of the decision itself) "the uncontradicted evidence shows that the 'Selja's' engines were not stopped until 3:15, fifteen minutes after her master had heard the first whistle of the approaching vessel" (p. 6). "Had the master of the 'Selja' stopped her engines when he first heard the whistle of the 'Beaver', practically right ahead, as he himself testified, or at almost any time thereafter during the ten or more minutes the 'Beaver' was sounding her whistle every fifty-five seconds, manifestly the collision could not have occurred" (p. 5). And were such casual reader advised that a mistake had been made in the court's finding of fact, and that the uncontradicted evidence, instead of showing that the engines were not stopped until 3:15, *one minute* before the collision, shows that they were stopped at 3:10, *six minutes* before the collision, when the vessels were approximately two miles apart; and that at the time of the collision the "Selja" was actually backing away from the approaching "Beaver"; he would probably be led to express the belief that the decision would be reformed so as to relieve the "Selja" from all fault contributing to the accident.

The mistake intimated has actually been made, and we are confident in our belief that the court will at least be prompt in its recognition and correction of this error, even though it may find that it does not affect its ultimate opinion as to liability.

We confess our inability to even suggest from what source or data the court has been led to make this error, and we furthermore fully appreciate the task

before us if we are to succeed in overcoming the natural disinclination of the court to approach anew a consideration of this case with so radical a change in the vital facts.

It is difficult to convincingly disprove a stated fact by merely averring a general negative; nevertheless, we feel pretty sure of our ground in the matter before us and, therefore, have no hesitancy in respectfully asserting that no word of the record in this case can be cited to support the court's finding that the "Selja's" engines were not stopped until 3:15, one minute before the collision; and in making this assertion we are fully mindful of the court's statement that this is the uncontradicted evidence of the case. Indeed, so sure are we of this fact that we go even further and affirm that the uncontradicted evidence is that the vessel's engines were not working *six minutes* before the collision, and that at the time of the impact she was backing away from the "Beaver". These were so conclusively the established facts that, in presenting our main brief, the rather unusual course was pursued of printing in red ink on the outside cover what we knew was to be the ultimate question for the court to decide:

> "Is a vessel actually going astern at the time of collision liable for such collision merely because she failed to stop her engines until six minutes before the same, while the vessels were still about two miles apart?"

While our opponents did not expressly assent to the propriety of the foregoing question, the only direct

criticism of it is found at page 2 of their opening brief, where it is said:

> "Not even the red ink foreword on the cover is a fair summary of the evidence as we understand it."

Nevertheless, there is to be found thereafter no dispute of this "foreword" that would in any wise sanction a finding that the "Selja's" engines were not stopped until 3:15. Indeed, the briefs on both sides are replete with references to the admitted fact that the engines were stopped at 3:10, and at page 28 of the main brief for the "Beaver" the following testimony of Capt. Lie is quoted to show that fact:

> "Q. How long was it after 3:10 before you sighted the 'Beaver'?
> A. Five minutes.
> Q. How were the engines going from 3:10 to 3:15?
> A. Stopped.
> Q. When did you stop them?
> A. 3:10.
> Q. What was the speed of the 'Selja' when you stopped the engine?
> A. Three knots."

Furthermore, a very large share of the record, for which our opponents are responsible, is devoted to the attempt to show that the "Selja's" engines were stopped *before* 3:10, and that for many minutes before sighting the "Beaver" she was lying dead in the water, and was at fault for not blowing two whistles as signifying that fact. Neither the pleadings, the proof, nor the arguments, oral or written, so much as hint at what the court has now found to be the "uncontradicted" evi-

dence of the case. The fact that the "Selja's" engines were stopped at 3:10 was admitted at the outset, and never thereafter was that admission disturbed, although nearly half the trial was taken up with counsel's attempt to prove that they were stopped long before 3:10. Indeed, the only issue between us related to appellee's contention that the "Selja's" engines had been stopped long before 3:10, and that at 3:15, the time the two vessels sighted each other, she was, and had been for many minutes, lying dead in the water.

The libel reads:

> "At 3:10 P. M. the 'Selja's' engines were stopped. At the time her engines were stopped she was making about three knots per hour."
>
> (Record, Vol. I, p. 14.)

The answer of the "Beaver" to this allegation reads:

> "Admits that at 3:10 P. M. the 'Selja's' engines were stopped; alleges that it is ignorant as to how long they had been stopped or as to their speed, if any, between 3:05 and 3:10 P. M., but in that behalf alleges that at 3:10 P. M. the Selja was *almost at a standstill* in the water; denies that she was making three knots per hour at 3:10 P. M., and in that behalf alleges that she was *almost at a standstill* as aforesaid."
>
> (Id., p. 25.)

On the issue thus initially presented the case was tried: A *mutual* agreement that the engines were not working at 3:10 P. M., and an issue as to how long *before that time* they had been stopped. Fifty-two pages of appellee's main brief alone (pp. 96 to 148) are exclusively devoted to this issue, the argument being

that for a period extending from five to ten minutes before the collision the "Selja" was lying at a standstill. The court, quite properly we believe, paid no attention to this contention, and we refer to it only as showing that our opponents, instead of attempting to advance the novel position taken by the court, were on the contrary insistent that, at the hour of 3:15, the "Selja" had been dead in the water for many minutes, and that her failure to so advise the "Beaver" by blowing two whistles was the cause of the collision. Counsel for the "Beaver", as a closing summary to this contention, to which he devoted half a hundred pages of his brief, says:

> "Whether he had been stopped for ten minutes * * * or for a longer or shorter period, is immaterial. He should have blown two long blasts of his whistle as provided by Rule 16 (15), *and his failure to do so led Captain Kidston to believe that the 'Selja' still had way on and to adopt a maneuver which sent him directly into the 'Selja' instead of starboarding his wheel and clearing her bows, as he would have done if he had known she had stopped.*"
>
> (Appellee's Opening Brief, p. 147.)

In other words, because the "Selja", before she was sighted and when the "Beaver" first heard her whistle, was at a standstill, and had been for some time, she should have blown two whistles; failing to do so Capt. Kidston was deceived by the whistle which was blown, and thought he could clear the unseen "Selja", assumed to be oncoming, by changing his own ship's course to starboard, and, in doing so, ran into the stopped "Selja". This was the "Beaver's" seriously urged contention in

both courts. It is true that it weakens, if it does not destroy, the "Beaver's" further contention as to the "Selja's" violation of the stopping requirement of Article 16, and it certainly is inconsistent with the contention that such violation was a contributory cause to the collision,—but this inconsistency was pointed out by us (Opening Brief, pp. 44-50).

Again we go so far as to say that it is doubtful whether there would ever have been any litigation over the question of liability for this collision, at least on our advice, if there had been proof that the "Selja" had not stopped her engines until one minute before the actual impact. At any rate it is evidence that, had there been the slightest possibility of such proof being made, our opponents would not have wasted their time in so strenuously attempting to establish the much less conclusive contention of a violation of the two whistle rule, a contention entirely ignored, as we thought it would be, by both this and the trial court.

We have already referred to the libel and the admission of the answer, but what of the proofs on the point before us?

Besides Capt. Lie's testimony, the vessel's first officer (off duty at the time) testified that before the "Selja's" three whistles were blown he had noticed that her engines were not running (Vol. I, p. 52), and that after the "Selja's" three whistles were blown her engines were started, and that the vessel had sternway before the impact (id. 54, 55).

Rambek Eggen, chief engineer (off duty at the time), says that in his room at about five minutes after three he heard the engine room bell, which slowed the "Selja's" engines, and that about five minutes after that the stop bell was rung, and the engines were stopped (id. 67, 68).

On the day after the collision the chief engineer prepared and signed, with the second and third engineers, the engine room log for November 22nd (id. 70), which was introduced in evidence as Libelant's Exhibit 1. The following is an extract from this log:

> "At 1 P. M. there was telegraphed half speed and then proceeded with about 40 revolutions until 3:05 P. M. when slow speed was ordered and at 3:10 stop. At 3:15 full speed astern was ordered * * *."
>
> (Vol. IV, p. 1452.)

The vessel's second engineer (off duty at the time) testified that he heard the stop bell and felt the engines stop some minutes before he heard the "Beaver's" whistle on the port bow (Vol. I, pp. 93, 94); that when he saw the loom of the "Beaver" he rushed down into the engine room, but first looked over the side of his own ship and found that she was working astern,—the back water from her propeller was going forward along the side of the vessel; and that when he reached the engine room he found the engines working astern, and that then the shock came (id. 95).

Arvid Bjorn, the "Selja's" third officer, on duty on the bridge with Capt. Lie, testified that the "Selja's" engines were stopped by the captain at ten minutes past

three; he looked at the clock when the stop order was sent by telegraph (id. 115, 116).

Pedar Hansen, the "Selja's" third engineer, on duty at the time, testified that after getting the slow bell at 3:05 he got the stop bell at 3:10, and the full speed astern bell at 3:15; and that all of these orders were immediately executed (id. 127, 128).

Furthermore, all the "Selja's" deck officers signed the ship's log for November 22nd, made out the day after the collision, and in this log we find the following entry:

> "At 3.5" P. M. ordered slow speed as we heard the whistle nearing, and 3.10 stopped the engine, the vessel being then nearly at a standstill. At 3.15" saw the contour of the other vessel and we then ordered full speed astern."
>
> (Vol. IV, p. 1453.)

There was no cross-examination of these officers of the "Selja" that in any way affected their testimony as to the time the vessel's engines were stopped, and her backward movement at the time of the collision. Not only did Capt. Lie add his testimony to that of the other officers of the "Selja", in the establishment of this latter fact, but Capt. Kidston, master of the "Beaver", volunteered the admission of the same fact:

> "A. After we hit that ship we remained in that hole I suppose for maybe five or six seconds, maybe a little longer; it seemed longer to me but it might not have been any longer. The 'Selja' was backing at the time——
>
> Q. (intg.) At the time you hit her?
>
> A. At the time we hit her she was backing. It seemed to me that for the time we remained in that

> hole that we penetrated in her side, that the 'Selja' in backing had pulled us around a bit with her, had pulled our bow around with her as she was backing, so that when we came out of the hole we came out at a little bit more of an angle than we went in."
>
> (Vol. III, pp. 907, 908.)

The wireless operator on the "Beaver" said that when he first saw the "Selja" she was a good ship's length and a half or two away, and she was neither going forward nor astern, and he remarked to a passenger:

> "Why don't the damn fool go ahead or astern. Look at him, he is standing still."
>
> (Vol. IV, pp. 1112, 1113.)

Furthermore, the lower court's decision is based upon the fact that the engines of the "Selja" were stopped at *3:10 P. M.* (Vol. IV, p. 1393).

We respectfully submit that the admitted fact of the pleadings, that at 3:10 the vessel's engines were not working, is as clearly shown by the record as is the fact that the "Beaver's" speed was immoderate.

As we have said, we presented our written argument knowing that the ultimate question to be decided was whether it could be said that a vessel had contributed to a collision, which had stopped her engines six minutes before the same, and at the moment of impact was backing away from the point of the intersection of the courses. Quite naturally this question has not been considered by the court, for the reason that, under the facts erroneously found, a vessel proceeding at three

knots, or even approximately at that speed, one minute before the collision, could not very well have checked her speed so as to have been moving backward at the time of the collision. With the erroneous finding of the court in mind we can quite easily appreciate the unfavorable estimate of Capt. Lie's veracity, when he testified that at 3:15 he thought the "Selja" was making practically no headway (Decision, p. 5).

As bearing on the vital significance of the court's erroneous findings, we call attention to that part of its decision where it is said that "manifestly the collision could not have occurred" had Capt. Lie stopped his engines at almost any time after hearing the first whistle, during the ten or more minutes that the "Beaver" was sounding her whistle every fifty-five seconds. This, as the court must now see, is precisely what Capt. Lie *did do,* and yet the collision *did* occur. We respectfully suggest that what the court meant when it said it could not occur was that the collision could not have occurred through the contributory fault of the "Selja", for, of course, even though the maneuvers of one vessel may be above criticism, they are not necessarily a preventative against the result of the reckless maneuvers of another vessel. The opinion of the court, that, if Capt. Lie had stopped earlier than one minute before the collision, it could not have occurred, because "at the rapid and unlawful speed at which the 'Beaver' was going she would necessarily have passed the point of collision", would clearly have found verification in the circumstances of this collision but for one addi-

tional fault on the part of the "Beaver"—a fault arising out of a fact, which, the court will doubtless remember, was not only shown by the evidence but admitted by counsel. And that is this: Before sighting the "Selja", and after hearing her whistle, the "Beaver's" master *changed his vessel's course.* As we have said, this fact is clearly established, and counsel admits it when, at page 147 of appellee's opening brief, he says that Capt. Kidston was led by the "Selja's" one whistle "to adopt a maneuver which sent him directly into the 'Selja' ". If Capt. Kidston had kept his course the court's opinion that the "Beaver" "would necessarily have passed the point of intersection" would have found verification, but the "Beaver's" reckless departure from her course, and her actual pursuit of the retreating "Selja", necessarily led to a collision, not at a point on the line of the "Beaver's" original course, as seems to be assumed by the court, but at a point on a divergent line leading directly towards a course which the "Selja" was pursuing backward away from the forward moving "Beaver". Capt. Kidston admits that had he not made this mistake of putting his wheel hard-a-port, and thereby directing the "Beaver's" course to starboard, the collision would not have occurred:

> "Q. And yet if you had not done it there would have been no collision?
>
> A. If I had kept my helm to starboard I don't believe there would have been any collision."
>
> (Vol. III, p. 903.)

That the "Beaver" followed up and ran down the retreating "Selja" was called to the court's attention at page 39 of our main brief.

An assumed similar situation undoubtedly was the cause of the emphatic language of the Circuit Court of Appeals in the *St. Louis* case (98 Fed. 750):

> "Of course, if the Delaware was reversed so that she was going backward in the water when the collision took place, and the St. Louis was not going at a moderate rate of speed, it cannot be held that the failure of the Delaware (in violating the rule as to stopping) was contributory to the collision."

Such a situation has been clearly proven in this case, and, indeed, has been admitted by Capt. Kidston of the "Beaver". Such a situation was the cause of the unusual red ink foreword printed on the cover of our brief, but it is a situation made impossible under the court's erroneous conception of the time the "Selja's" engines were stopped, and, therefore, it was not and could not have been passed upon by it. The situation proceeds on an assumed violation of Rule 16 by the "Selja" and, therefore, bears solely on the question of that vessel's contributing negligence.

In view of what this court has said was *manifest,* had the "Selja" stopped her engines at an earlier time than one minute before the collision; in view of the fact that she did so *six minutes* before the collision; in view of the fact that at the time of the collision she was backing, and that in order to strike her the "Beaver" had to deviate from her original course, which she recklessly did before sighting the "Selja"; and in view of Capt. Kidston's frank admissions; we respectfully submit that the case be considered anew that full and complete

justice may be done, to the end that litigation of this magnitude may not pass into final judgment upon an erroneous conception of vital facts, upon which hinges the all-important question of the "Selja's" contributory negligence, and more especially do we urge this petition since the cause for the present unfortunate situation, we respectfully submit, cannot be attributed to any lack of presentation on our part, as may readily be seen from the record.

SECOND GROUND:

The remaining grounds in support of this petition may be more briefly presented. The principles they bear upon are of little importance under the findings of the present decision. They become of immense importance, however, when considered in the light of these findings when they shall have been corrected to conform to the record.

The so-called rule of *The Pennsylvania* case reads as follows:

> "The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship to show not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."
>
> 19 Wall. 136 (22 L. Ed. 151).

Much time was taken up in both the lower and this court over our contention as to the construction of this rule. Both courts, however, make the same mistake, we respectfully submit, in stating the rule, for it is said that

> "The law is that when a vessel has committed a positive breach of a statutory duty she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."
>
> (Judge Bean's decision, Vol. IV, p. 1397; this court's decision, p. 7.)

It will be seen from our briefs that we pointed out to the court that such a construction broadens beyond all reason the rule aforesaid, which has already been characterized by a court enforcing it as *"mechanical and arbitrary."* And, indeed, this court has recently affirmed (190 Fed. 475) a decision of Judge Wolverton (*The Europe,* 175 Fed. 596), wherein this learned judge says:

> "A vessel in collision is presumed to be in fault *if, at the time,* it was acting in violation of a statutory rule intended to prevent the occurrence."

As is shown in the case of *The Europe,* the Pennsylvania rule is limited to a breach existent "at the time of the collision",—it is not applicable to a breach which a vessel *has committed,* but to one which *is being committed.* Whether the "Selja's" breach of Article 16, six or more minutes before the time of the collision, could be said to bring her within the rule can, for the moment, be set aside. The question first is: Does the burden of proof rule apply, irrespective of the time of the collision? For instance, could it be said to apply to a steamer in a fog which, an hour before the collision,

blew a horn instead of a steam whistle, although at the time of the collision she was blowing the steam whistle? Obviously not, and we do not believe this court intended to lend its sanction to such a construction. There must be some relation in time between the breach and the collision. The rule itself says it must be "at the time of the collision", but we concede there may be breaches which ought not to be literally so restricted. If, in a fog, a sailing vessel should be blowing a fog horn not operated by mechanical means, as required by law, that would be a breach at the time of the collision, which would unquestionably bring into operation the burden of proof rule. If a vessel is sailing at night without regulation lights, and a collision occurs, that would be another illustration.

As we have pointed out in our main brief, the test should be that if a vessel violates a rule, and the violation can possibly be said to be not overcome at the time of the collision, then the Pennsylvania burden of proof rule applies (main brief, p. 121). Applying such a test to the "Selja's" violation of Article 16, it is obvious that the effect of her violation of it had been overcome at the time of the collision, *if,* at that time, she was moving backward from the natural point of the intersection of the original courses of the two vessels. The applicability or non-applicability of the Pennsylvania rule is, therefore, seen to be necessarily connected with the time of the stoppage of the "Selja's" engines, for upon this fact in turn depends the question of whether her movement was forward or backward at

the time of the collision. As the court has erroneously found the first fact, which makes impossible the second, it follows that there has been no right consideration in the present decision of the applicability of the Pennsylvania rule. As the decision now stands we admit that the "Selja" was in the actual violation of Rule 16 at the time of the collision, and, therefore, the rule is applicable. But the inquiry should be: *Is the rule applicable under the true facts of the case?* This, we respectfully submit, the court has not passed upon.

THIRD GROUND:

As we have already pointed out in the argument of the first ground for the granting of this petition, had the "Beaver" kept her course there could have been no collision, for she would have safely passed the natural point of collision where the two courses would have intersected, because the "Selja" was moving backward and away from such point. The present decision, however, proceeds on the theory that the "Selja" could not have been backing, and also that the collision occurred at the intersection of the original courses. Discussing our contention as to the non-contributing fault of the "Selja", and applying the burden of proof rule of *The Pennsylvania* case, the court says:

> "So far from the Selja having sustained that burden, it is perfectly apparent that had she observed the statutory rule, or even the rule of good seamanship, the Beaver would necessarily, as has

already been observed, have passed the point of collision before the Selja could have reached it.''*

(Decision, p. 8.)

The question which we now raise is: Has the court applied to this case the proper test of contribution, when it says that ''it is perfectly apparent that had she (the 'Selja') observed the statutory rule, or even the rule of good seamanship, the 'Beaver' would necessarily have passed the point of collision before the 'Selja' could have reached it''. Suppose, instead of stopping at all, the ''Selja'' had increased her speed, in violation of the first part of Article 16, then the two vessels would not have reached the point of collision at the same time, and one would be forced to the conclusion that, because the ''Selja'' had *violated* Article 16, she had thereby avoided a collision. Surely, such a test could not be the proper one to apply to the principle of contributory negligence, and we can do no better than reiterate the condemnation of such test made by the Supreme Court of the United States:

> *''It is true that if she had stopped promptly, she might not have reached the point where the courses of the two steamers intersected; but it is equally true that if she had been going at a much greater speed than she was she would have passed the point of intersection before the Umbria reached it. Manifestly this is not the proper test. The propriety of certain maneuvers cannot be determined by the chance that the two vessels may or may not reach the point of intersection at the same time, but by*

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* Note. Of course, if the "Selja" was backing, it would not be accurate to say that she had "reached" the point of collision. Such expression more properly conveys the idea of progress, not retrogression. The "Selja's" part in the collision, if she was backing, was one of continuing activity taking her away from collision.

the question whether their speed can be stopped before their arrival at the point where the courses intersect."

"If two steamers are approaching each other in a fog, manifestly their maneuvers must be determined, not by the chance of their meeting at a point where their courses intersect, but upon the theory that their courses shall not actually intersect—in other words, that both shall stop before the point of intersection is reached; and if one of them is running at such a speed that no maneuver on the part of the other can prevent that one from passing the point of intersection, the latter only is responsible."

The Umbria, 166 U. S. 404; 41 L. Ed. 1053;

(See Appellant's Opening Brief, p. 98.)

In the case of *The Cascades,* 178 Fed. 726, decided by Judge Wolverton, and *affirmed by this court* in October, 1911 (190 Fed 729), this rule of the Umbria case is quoted in full with approval.

Again, in the case of *The Belgian King* (125 Fed. 869), this court, after citing both parts of Article 16, lays down practically the test of *The Umbria* case, when it says:

> "The rule is that a vessel in a dense fog is bound to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill by reversing her engines at full speed, before she could collide with a vessel which she could see through the fog."

And in the briefs of distinguished counsel for the Tellus in that case the rule of *The Umbria* case is referred to several times, while distinguished counsel for *The Belgian King* unsuccessfully raised in his brief the identical argument against the applicability of the Umbria rule that has been raised by counsel in this case:

Article 16 was not in force at the time of the Umbria decision, etc. It was in force when *The Cascades* was decided, and when *The Belgian King* was decided.

Furthermore, the test of contribution, as laid down by the Supreme Court, is founded on logic and sound sense, and does not depend upon the question of whether a certain rule is or is not in force. To say that when a steamer is running in a fog at such a speed that no maneuver on the part of another can prevent the first from passing the point of intersection of their two courses, the latter only is responsible for an ensuing collision, is to state a principle governing the rule of contributory negligence in collision cases that will remain unaffected by rules governing the maneuvers of vessels in fogs for long to come, because it is both equitable and sound. Why should such an equitable principle be affected by the subsequent adoption by Congress of Article 16,—an article that, as was said by the Circuit Court of Appeals in *The Umbria* case,

> "merely formulates the duty which nautical experts had found it necessary to observe, and which the courts had often declared obligatory" (53 Fed. 291).

The principle that will hold to sole liability any vessel, whose speed in a fog is such that she cannot be prevented from passing the danger point (the intersection of the two courses) by anything the other vessel may do, whether in obedience to statutory rule or good seamanship, appeals to us as one which will still receive the Supreme Court's stamp of approval, as it has on at least two occasions received the approval of this court since the adoption of Article 16.

FOURTH GROUND:

The major and minor fault rule is an old one, and undoubtedly has often been applied by this court, and we are free to admit its inapplicability to the facts of the case under the erroneous findings of the present decision. If the "Selja" did not stop her engines until one minute before the collision, such fault would unquestionably have placed her on a plane with the reckless "Beaver", and would have made inapplicable the rule in question. The court must see, however, the vital change in the whole case made by rectifying the finding as to when the "Selja's" engines were stopped. It makes possible the evidence of the "Selja's" officers as to the backward movement of the "Selja", as well as the admissions of Capt. Kidston to that effect, to say nothing of the applicability of our expert testimony establishing the same fact. To consider the case with a finding that the engines were stopped six minutes before the collision makes it appropriate for this court to do what was not before necessary or appropriate, namely: to consider our brief on the question of the applicability of the major and minor fault doctrine (Opening Brief, p. 107).

CONCLUSION.

We frankly confess that our best hope of success in presenting this petition lies in the belief that the court will see the inequity of permitting the case to stand concluded upon an error of fact so vitally at variance with, as well as foreign to the record, as to bring to naught the labor and effort which have fallen to counsel in the

case's presentation, to the end that the court's consideration of it might be simplified and helped. To deny appellant a consideration of this appeal upon the established hypothesis that the "Selja's" engines were not working at 3:10, and that at the time of the collision, six minutes later, the vessel was backing away from the "Beaver", would permit of an undeserved reproach upon our efforts, which we know this court would not consciously be a party to.

Furthermore, it must be obvious that with this case considered in the light of the "Selja's" engines working until one minute before the collision, and only being stopped after the vessel had entered the very "jaws of the collision", all consideration of contributory negligence, burden of proof and the doctrine of major and minor faults became unnecessary, and could not with profit be considered.

We believe this court knows that had its decision, even though adverse to us, shown a consideration of the vitally and clearly established facts bearing on the subject of the "Selja's" contributory negligence, we would have been loath to accord it anything less than respectful acquiescence, subject of course to such rights of review as our client might have.

Dated, San Francisco,
January 30, 1915.

Respectfully submitted,

E. B. McClanahan,
S. H. Derby,
Proctors for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for appellant and petitioner in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

E. B. McCLANAHAN,
S. H. DERBY,
Of Counsel for Appellant and Petitioner.